(3) Khurshed Pestonji Gandhi
of Rustom Baug, Block 15, Byculla, Bombay..

in equal shares and proportions or to the survivor or survivors of them.

(c) And as to the remaining equal one-fourth share and any share of the income no longer payable under clause I (a) and (b) thereof to pay the same to the treasurer of the Singapore Institute for the Blind.

II. *Upon trust* upon the expiration of the trust period to hold the whole of the said shares or if sold the proceeds thereof and the investments representing the same *in trust* for the said Singapore Institute for the Blind absolutely."

The rest and residue of his entire estate, by clause 5 of his will, went to the "Singapore Institute for the Blind" absolutely. Clause 5 reads as follows:—

"I *give devise* and *bequeath* all the rest residue and remainder of my real and personal estate whatsoever and wheresoever situate unto my trustee *upon trust* to sell the said real estate and to call in sell and convert into money such part of my personal estate as does not consist of money with power to postpone such sale and conversion for such period as my trustee without being liable to account may think proper *upon further trust* out of the monies to arise from the sale and conversion of my said real and personal estate and out of my ready money to pay my funeral and testamentary expenses death duties and my debts and to stand possessed of the residue remaining in its hand *in trust* for the Singapore Institute for the Blind absolutely".

The problem I have to decide, in the events that have happened, is whether under clause 3 (I) (b) proviso (iii) of the testator's will the two named daughters of Shirinbai Framroz Framroz are entitled upon the death of their mother to the share of the income bequeathed to Rustam Pestonji Gandhi under clause 3 (I)(b).

Confining myself entirely to the language of the testator's will, the answer to the problem must, in my opinion, be in the negative. It seems to me that the language used by the testator in proviso (iii) of clause 3 (I) (b) read with the other four provisoes of clause 3 (I) (b) and with clause 3 (I) (c) has, in plain and clear terms, expressed his intention. The word "then" in the phrase "or if she shall then be dead" in proviso (iii) grammatically refers back to the earlier part of the proviso, namely, on the death of Rustam Pestonji Gandhi. In my judgment, the testator was using and intended to use the word "then" in that sense in this proviso in the will. In the events that have happened the two daughters do not take Rustam Pestonji Gandhi's share on the death of their mother and Rustam Pestonji Gandhi's share devolves under clause 3 (I) (c).

It is argued on behalf of the daughters of Shirinbai, having regard to the general scheme of the will and all the relevant circumstances including the circumstances in which the will was made, the position of the testator, his relationship to them and their mother and their circumstances, together with the provision for other beneficiaries, that the testator intended to benefit his relatives particularly his widowed sister-in-law and her children and more particularly her children after her death so that the court ought to construe the phrase "or if she shall then be dead" as if the testator meant "and on her death". I am unable to accept this contention. It seems to me perfectly clear from the terms of the testator's will that the main object of the testator's bounty was the "Singapore Institute for the Blind" and in my judgment the expressed intentions of the testator having regard to the terms of the will require me to answer the first question in the negative and the second question in the affirmative.

Questions answered.

Solicitors: *Drew & Napier; Mallal & Namazie; Rodyk & Davidson.*

GOH AH TIN & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) November 27, 1969]

[Johore Bahru — Criminal Appeal No. 53 of 1968]

Customs and Excise — Importing prohibited goods — Meaning of "prohibited goods" — Order made prohibiting removal of swine into and out of State — Animals Ordinance, 1953, s. 36 — Custom Ordinance, 1952, s. 131 (1).

Import and Export — Prohibited goods — Order prohibiting removal of swine.

This was an appeal against the convictions of the appellants under section 131 (1) (iii) of the Customs Ordinance, 1952, for being concerned in importing prohibited goods, to wit, 72 pigs. By reason of the existence of swine fever the Menteri Besar of Johore had made an order under section 36 (1) of the Animals Ordinance, 1953, prohibiting the removal into and out of the State of any swine.

Held: (1) as the order of the Menteri Besar in this case did not prohibit the importation or exportation of goods, the pigs in this case were not "prohibited goods" within the meaning of the Customs Ordinance, 1952;

(2) the convictions must therefore be quashed and the appellants retried on a proper charge under the Animals Ordinance, 1953.

MAGISTRATE'S CRIMINAL APPEAL.

Charles N. Mendis for the appellant.

Mohamed Noor bin Ahmad (Deputy Public Prosecutor) for the respondent.

Syed Othman J.: The charge against the appellants was as follows:

"That you (1) Chia Chee Kwang, (2) Goh Ah Tin, (3) Tan Juak Kiang and (4) Goh Hai Chui, at about 12.55 a.m. on 25.8.67 at Tanjong Petrie, Johore Bahru, in Motor Tongkang No. SC 9851, were concerned in importing prohibited goods, to wit 72 pigs, the import of which into the State of Johore is prohibited except under and by virtue of a written permission granted by or on behalf of the State Veterinary Officer, Johore, under section 36 (1) of the Animals Ordinance of 1953 (J.P.U. 14 dated 13.5.67) contrary to section 131 (1) (a) and punishable under Section 131 (1) (iii) of the Customs Ordinance, 42 of 1952."

They claimed trial at the conclusion of which the learned president, sessions court, convicted and fined the first appellant $8,200 in default, 2 years imprisonment and the second and third defendants $5,000 each in default, 2 years imprisonment.

When the appeal came up before me I set aside the conviction, sentences and other orders of the learned president sessions court relating to the case and ordered that the appellants be retried on a proper charge under the Animals Ordinance, 1953. My reasons for so doing are as follows:—

In dealing with the case I do not think that there is any need for me to consider the evidence as adduced by the prosecution in order to establish its case against the appellants. I shall only consider the law on which I am of the opinion that the learned president sessions court has erred as is apparent from the record.

In my judgment the charge in this case was bad.

J.P.U. 14 of 13th May, 1967, referred to in the charge is an order made by the Menteri Besar, Johore, in exercise of the powers conferred on him by sub-section (1) of section 36 of the Animals Ordinance, 1953. It declares the State of Johore to be an infected area by reason of the existence of swine fever in the State and prohibits the removal into or out of the State of any swine or its carcass except with the written permission of the State Veterinary Officer or other authorised officer.

Sub-section (5) of section 36 of the Animals Ordinance, 1953, prescribes the penalty for failure without reasonable excuse to comply with the order under sub-section (1), which is a fine of $200 for each offence.

But the charge was not in respect of the offence created by this section. It was in respect of the offence of having been concerned in importing prohibited goods, namely pigs, by reason of J.P.U. 14 of 1967 made under the Animals Ordinance. Section 131(1)(a) of the Customs Ordinance was applied as being the offence which was alleged to have been committed and section 131(1)(iii) of the Ordinance invoked as the penalty section.

From what I can see these provisions of the Customs Ordinance were applied by reason of the definition of "prohibited goods" in sub-section (1) of section 2 of that Ordinance. The definition reads: "'prohibited goods' means goods the import or export of which is prohibited, either absolutely or conditionally by an order under section 30 of this Ordinance or by any other written law for the time being in force in the Federation." I have underlined the critical words.

It would appear that by virtue of this definition if the importation or exportation of goods is prohibited under any other written law, section 131(1)(a) of the Customs Ordinance may be invoked for the offence of being concerned in importing or exporting such goods contrary to such prohibition. But what is prohibited by the order under sub-section (1) of section 36 of the Animals Ordinance is in respect of the "removal into or out of the State." The word "import" or "export" is not used in the order made under that sub-section as it is in the provisions of the Customs Ordinance.

Although section 30 of the Customs Ordinance, to which sub-section (1) of section 2 is related, also uses the word "removal", the word is not used in this case in the same sense as in the order under the Animals Ordinance. That section speaks of "removal from one place to another place in the Federation" whilst the order under the Animals Ordinance speaks of 'removal into or out of the State."

Having regard to the different expression being used in the two legislations in regard to the offences which they create and to the fact that the Animals Ordinance not only provides its own penalty (which is very much less than that under the Customs Ordinance) but also expressly provides a reasonable excuse as a defence for its offence, it is to my mind the clear intention of the legislature not to treat the offence of removing prohibited animals into the State under an order made under the Animals Ordinance as in the same category as the offence of importing prohibited goods under an order made under the Customs Ordinance.

Further, I am of the opinion that unless there is something in that other written law referred to in the definition of "prohibited goods" which clearly expresses the intention of the legislature to relate it to the Customs legislation and particularly to its penalty provisions, or unless that other written law prescribes the offence in respect of the prohibited goods in similar terms as in the Customs legislation and prescribes no other penalty for such offence, the provisions of the Customs legislation should not be invoked for an offence under that other written law.

I therefore see nothing in the case which can be said to be within the contemplation of the legislature that the offence under the Animals Ordinance of removing pigs into the State without the written permission of the State Veterinary Officer should be met with the rigours of the Customs law.

There is one observation I wish to make in this case before I conclude.

According to the Chief Customs Officer, who was the main prosecution witness during the trial, after seizure, the pigs were auctioned the very same morning.

Now the intention of the order in J.P.U. 14 of 1967 is to regulate the movement of pigs in order to check the spread of swine fever. Following this order the State Veterinary Officer made an order under sub-section (2) of section 36 of the Animals Ordinance prohibiting the movement of pigs in the State unless authorized in writing by an officer of the Veterinary Department (vide J.P.U. 15 of 1967.)

In this case before the pigs were auctioned, there is nothing to show that the Veterinary Department was called to examine them. All the indications are that the Customs Department in its undue haste of disposing the pigs was dealing with the case as if it had been a revenue case. To say the least the action of the Customs Department was not in accord with the express provisions of the legislation in regard to checking the spread of swine fever.

Conviction set aside. Retrial ordered.

Solicitors: *Mendis & Loh.*